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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARIUS SIMS, Defendant and Appellant.	B157575 (Los Angeles County Super. Ct. No. BA187063)

Appeal from a judgment of the Superior Court of Los Angeles County. Terry Green, Judge. Affirmed.

Marilyn S. White-Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

Darius Sims appeals from the judgment rendered following a jury trial in which he was convicted of the first degree murder of Beverly McCoy (Pen. Code, §§ 187, 189; undesignated section references are to that code), with a special circumstance finding that he intentionally killed her by means of lying in wait (§ 190.2, subd. (a)(15)), and with further findings that he personally and intentionally discharged a firearm, causing her death (§ 12022.53, subd. (d)), and personally discharged and used a firearm (§§ 12022.53, subd. (c), 12022.5, subd. (a)(1)). The jury also convicted appellant of three counts of kidnapping (§ 207, subd. (a)), involving his and McCoy's three children, and one count each of making a criminal threat (§ 422) and violating a domestic protective order (§ 273.6, subd. (a)). Appellant was sentenced to a term of life without possibility of parole plus 33 years to life, with additional determinate terms to run concurrently.

Appellant contends that (1) admission of evidence of prior acts of domestic violence was error and a denial of due process; (2) the giving of CALJIC No. 2.50.02 (2000 rev.), concerning uncharged domestic violence offenses, also was error and a denial of due process; (3) the prosecutor committed misconduct that induced a defense witness not to testify, in violation of appellant's rights to compulsory process, to present a defense, and to due process, and the trial court's ruling precluding that witness's testimony also infringed those rights; and (4) the sentence of life without parole was not subject to enhancement under section 12022.53. We find error only with respect to the court's ruling regarding the defense witness, and conclude that this error was not prejudicial. We therefore affirm the judgment.

FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that appellant and the victim McCoy began a relationship in the early 1980's. They lived together intermittently, first in Los Angeles, then in Lancaster. The couple had a son, Darius, in

1987, and two daughters, Amber and Nikita, each two years later.[1] By 1998, McCoy had returned with the children to her family's Los Angeles fourplex, where appellant occasionally joined them.

Evidence was received regarding incidents of domestic violence before the offenses. On the morning of December 2, 1994, Los Angeles Sheriff's Deputy Brad Feehan responded to a domestic disturbance call in Lancaster and encountered McCoy, who told him appellant had punched her in the face, and that she wanted him arrested. Deputy Feehan observed the right side of McCoy's face to be red and slightly swollen, with a lump on her forehead and blood in her right eye. Inside the residence, the deputy met appellant, who told him he had twice "punched the bitch" because she hadn't given medication to one of the children. Appellant suggested that McCoy should leave. Deputy Feehan arrested him.

On the afternoon of October 14, 1998, Los Angeles Police Officer Rafael Lopez responded to a report of domestic violence and criminal threat at McCoy's residence. McCoy told him that the previous day appellant had appeared and demanded the keys to her car, which she had given him, in fear. He then had slammed her to the floor, kicked her, grabbed her by her shirt, and dragged her down a flight of stairs. Appellant had ordered the children into the car and left with them. Later that day, he had phoned McCoy and told her, "I'm gonna smoke you," and that he was leaving town with the children and would never return them. The next day, appellant had called again and said, "You think this is a game? I'm gonna smoke you." Officer Lopez and his partner obtained a five-day restraining order for McCoy, and advised her she would thereafter have to get one herself. They were unable to locate appellant.

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[1] The children originally bore appellant's surname, with the eldest being Darius Jr. After McCoy's death, they were adopted by her brother, and their surnames changed to McCoy. We refer to them herein by their first names.

On November 6, 1998, the Los Angeles County Superior Court issued a one-year restraining order against appellant, in favor of McCoy and the children. Four days later, Los Angeles Police Officers responded to McCoy's complaint that appellant had just come to her residence. She told them of the order, with which he had been served. He had also telephoned her after it issued.

Appellant's son Darius testified that a few months before June 1, 1999, appellant had told him, as they rode in a car together, that appellant and McCoy were having a lot of differences and he wanted to kill her. Thereafter on Memorial Day weekend, McCoy and the children went to San Diego, along with Zelda Washington, a longtime friend who had assumed the role of mother to McCoy after her natural mother died. They returned to Los Angeles on Monday, May 31, 1999.

Early in the morning of Tuesday, June 1, appellant telephoned Washington and angrily inquired where the children were. She replied she had spent the weekend with them. When appellant asked where, Washington demurred, and stated that McCoy had told her not to say, but to send him "to the source." Appellant replied, "Okay. I will just smoke the motherfucker." Washington tried to calm him down. Appellant had said similar things before, and she had assuaged him, so she did not believe he was going to do it.[2] But Appellant said he was "going up there."

Shortly after 7:00 a.m., McCoy and the three children emerged from her residence and got into her Mercedes, to drive to school and work. After starting the car, McCoy found it would not move normally, and she had Darius get out and check the tires.[3] He

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[2] According to Washington, appellant would become equally angry "[a]ny time [McCoy] went anywhere that he didn't give her permission to . . . ." Moreover, Washington recalled, on a prior occasion appellant had told her that he had two bullets which he was waiting to put in McCoy's head. Appellant denied having said this.

[3] Amber testified she had noticed the tires on McCoy's other car, which was parked adjacently, were flat.

reported that two appeared to have been slashed. As McCoy began walking back to the apartment to call for service, appellant drove up. He ran from his car after McCoy, who began running herself. While running, appellant pulled a handgun from his pants.

Appellant managed to get through the front door of the fourplex before it locked, and he pursued McCoy upstairs, where she was trying to unlock her apartment. Darius ascended the stairs behind them. Appellant and McCoy struggled face-to-face, and appellant overpowered her against a wall. He said, "Where did you take my kids?" McCoy then shouted, "Angel, no!" and appellant shot her in the head, twice. (Amber recounted that the second shot came after McCoy had fallen.) McCoy fell onto the stairs, and appellant stepped around her and hurried down, exhibiting no difficulty in doing so. He told the children to get into his car, and then drove, first to a hamburger stand, where he used a phone booth to call Washington.

Appellant told Washington, "I just put two bullets in her head. Beverly is dead and I think you should [be] the first to know." He also stated, "I got my god damn kids, and I am going," and "This isn't the first time I ever killed nobody. I have shot through crowds and all. I am not scared to die." He also said he was angry about Washington's niece allegedly having brought other men to see McCoy. He added that he had to kill her before letting anyone else have her.

Appellant then drove to his brother's house.[4] On the way, according to Darius, he stated he was sorry and that it was an accident. (Amber testified appellant did not say this.) On arrival, Darius observed a piece of McCoy's flesh on appellant's forehead. Appellant showered, and again said he was sorry, that he hadn't meant for it to happen. Police arrived and separated appellant and the children, taking him into custody.

En route to the police station at about 2:00 p.m., appellant stated he had intended to turn himself in, and just wanted a few days with his kids. He did not display signs of

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[4] Darius testified that appellant drove normally, observing lanes and stop signals.

intoxication. At the crime scene, detectives discovered two 9 millimeter casings on the stairway. A bullet was embedded in the carpet on the first step below the top, indicative of a downward shot

At 3:55 p.m., Los Angeles Police Detective Debra Winter and another detective interviewed appellant. The interview was videotaped and played to the jury. In the interview, appellant stated that McCoy had been shot when she "wrestled with" his gun and "it went off a couple times." He complained that she had obtained a restraining order and withheld the children from him as a device to get him to marry her. Early that morning, he had driven from the San Fernando Valley to McCoy's home, after phoning her and stating that he would be taking the children for a few days. He had been angry he hadn't been able to see them over the weekend.

Arriving at about 6:00 a.m., appellant stated, he had punched holes in the tires of McCoy's two cars, because the one he was driving was slower. When McCoy emerged, he approached her with the gun, which he had brought because she had once shot at him, but which he always carried. He intended to hit her with it, but they had "tussled" on the stairs and it had gone off. He recalled only one discharge. Appellant claimed he hadn't gone there intending to kill her, and the shooting had been accidental.

Immediately before, appellant stated, he had been at several bars, the last being Bob's Classy Lady (Bob's), where he had recently secured a job. He had had "a couple beers" that morning, but had not been drunk, as he didn't drink much. He stated he never used drugs. Earlier that evening, he had taken a woman named Sue to the Paradise bar in Panorama City. He had gone there about midnight, and had stayed until about 5:00 a.m., helping to clean up the club. Appellant stated he had felt angry about "the way I've been manipulated over the last couple of years."

Appellant told the officers that McCoy had not hit him that morning, although she had once hit him with a lamp, on an occasion when he had been charged with abuse in

Lancaster.[5] Appellant stated that after arriving at his brother's house, he had told another of his brothers to take the gun away. (Police officers had found that brother on a street, holding the gun in a bag.) Appellant denied murdering McCoy, and repeatedly stated he had not gone to her house with that intention. But he also stated he had told Washington he would turn himself over to the authorities after spending a few days with his children.

Los Angeles Police Department firearms analyst Rafael Garcia tested the gun recovered from appellant's brother, and determined that the cartridge cases found at the crime scene had been discharged by it, as had a bullet fragment recovered from the carpet there. From the orientation and location of that bullet, Garcia opined that it had been fired from a gun pointed straight down, and had passed through an intervening object before reaching the carpet. The semiautomatic weapon operated normally, and required a separate pull of the trigger to discharge each round. It had a "heavy trigger," requiring 16 pounds pull to cock and fire.

Deputy Los Angeles County Medical Examiner Stephen Scholz autopsied McCoy, and determined she had died from two gunshot wounds, one to the back of the head and the other to the left temple. He opined that the bullets had been fired from less than half an inch away.

Appellant's defense was that he had been intoxicated by alcohol and cocaine, had therefore had not intended to kill, and in essence the shooting had been accidental. Margaret Higgins, former owner of the Paradise Club in Van Nuys, testified that appellant had been a regular customer, as was his cousin, Alton Cullors. From his behavior, she believed that Cullors was a cocaine user. Appellant did not appear to be: he was even-tempered and drank only beer. Catherine Bishop, a bartender at the club,

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[5] Washington testified that McCoy had told her about hitting appellant with a lamp and then running to get a policeman, who arrested him. Washington also recounted that one night appellant had arrived at her house intoxicated, and had staggered and thrown up.

recounted that appellant and Cullors had been there together the night before the shooting. She had seen them drinking in the parking lot as well. Susan Valenzuela, whom Bishop believed to be a girlfriend of appellant's, also was present. Bishop believed Cullors to be a cocaine user. She could not tell whether appellant was, but he had not appeared to be under the influence of the drug that night.

Testifying in his own behalf, appellant stated that he had been arrested in Lancaster because of his own conversation with the officers. He had moved from McCoy's home when the restraining order was issued in 1998, but returned there for about a week, with her consent. On the afternoon of May 31, 1999, appellant had driven to Panorama City for a job interview at Bob's, a nightclub. Arriving early, he had a few beers and dinner at the Paradise. After the interview, at which he was hired for a security guard position beginning the next week, he returned to the Paradise. He had several drinks, including a beer and tequilas. Cullors arrived, and appellant ingested powder cocaine, which made him feel friendly and relaxed. Several guests who knew him provided the cocaine, which appellant took every half hour, sometimes twice. He and Cullors also consumed a half-pint bottle of Courvoisier, in the parking lot. When the Paradise closed at 1:45 a.m., appellant returned to Bob's, where he drank brandy. Although liquor was not allowed there, an employee had given him the drinks. He also used drugs, provided by one William Bell.

In the early morning, appellant testified, he drove Bell home in Los Angeles. From his car, appellant called Washington, and asked where his children had been. He was very upset because he was supposed to have met them at church and taken them to a festival in Long Beach on Sunday, but they had not appeared. Washington told appellant to "go to the source." Appellant denied responding he would "smoke the motherfucker." He then phoned McCoy from in front of her home, and they had an argument about their different attitudes toward marriage. Angry, appellant consumed another half pint of Courvoisier in the car. He testified he had last used drugs at about 5:00 a.m., when he dropped off Bell. Having decided to pick up his children, he flattened the tires of

McCoy's cars with a screwdriver, to prevent her chasing him, as she had before. He was very angry at her, but did not intend to kill her.

Feeling the influence of the alcohol and drugs, appellant went to buy cigarettes, and then donuts, for the children's breakfast. He tried to eat one and vomited. Ill, he decided to return to his mother's home, where he resided. But when he passed McCoy's street, he saw her and the children proceeding from the car toward the house. Appellant drove up and began to run toward her, causing her to run too. The gun that he always carried was in his pants. He caught up with McCoy on the landing, grabbed her, and asked where she had taken the children. They argued, she accusing him of being with another woman. They struggled, and he heard the gun fire, once. He did not intend to shoot her. As she fell, he saw she had been mortally wounded.

Appellant went downstairs and told the children to get into the car. He drove, and, unable to find his cell phone, stopped at a phone booth. There he called Washington, and told her to go to McCoy's apartment because she had been shot. Arriving at his brother's house, appellant told another brother to take the gun away. He then became sick again, washed himself, and went to sleep with the children, telling them it had been an accident and that he was sorry. Appellant stated that his videotaped statements had been truthful, except that he had not revealed the full extent of his drinking because he did not want people to know about that aspect of his habits.

On cross-examination, appellant denied telling Darius he wanted to kill McCoy, or feeling that way. He also denied punching and injuring McCoy in 1994, as Deputy Feehan had described, or doing any more than grab her in the 1998 episode. Appellant admitted violating the restraining order by going to McCoy's apartment a few days after it was issued, but he said he had done so to drop off money she wanted, for one of the children's birthdays. On June 1, 1999, he had drawn the gun because it began to fall out of his pants as he ran. Because of his privacy concern, he had denied using drugs when interviewed in jail by a psychiatrist.

Appellant claimed he had chased McCoy in order to resolve their argument. He acknowledged that his anger had caused the crime, although he asserted he had been in control of the situation and himself. Appellant denied racking the gun's slide or cocking the hammer, stating they apparently were stuck in position. He affirmed that he simply could not recall how the shots came to be fired, or that segment of the events.

Appellant admitted that immediately after the shooting he had picked up his gun and descended the stairs, stepping around McCoy's body. He did not attempt to aid her because she was so bloody it appeared hopeless. Appellant denied having previously shot anyone, or having so told Washington. He denied her entire account of what he said to her, and claimed he had told her to call the police. Appellant claimed he had told his brother to take the gun away so as to remove it from the children's presence, not to get rid of it. Appellant said he concealed his drug addiction out of embarrassment, having had four drug-using brothers.

While at the Paradise, appellant claimed, he ingested cocaine, some of which he had bought, and several "lines" which various individuals there gave him. When he left for Bob's at 1:45 he was feeling tipsy, from the drugs and alcohol, though not staggering. At Bob's, he drank brandy, and also consumed some more cocaine. When he left he was pretty intoxicated. At the donut shop, at about 6:00 a.m., he was sweating and his head was spinning from having drunk so much in a short time. Both the alcohol and drug consumption exceeded his usual levels. Appellant told the psychiatrist the cocaine made him feel happy.

Dr. Terrence McGee, a physician specializing in alcohol and drug addiction, testified that ingesting both alcohol and cocaine generates cocaine ethyline, a substance with strong euphoric effects and possibly a link to violent behavior. Alcohol affects coordination, balance, and input of signals, thus impairing driving ability. Cocaine consumption adversely affects judgment. On cross-examination, Dr. McGee stated that

the stimulative effects of cocaine generally end within a half hour after ingestion.[6] He opined that the ability to climb and descend stairs without showing imbalance would indicate that a person was not under the influence of alcohol.

Dr. Stephen Mohaupt, a psychiatrist who had interviewed appellant in March 2000 and again a year and a half later, testified that if cocaine is used in serial fashion, the initial euphoria and social disinhibition it causes will be supplanted by hyperactivity, irritability, and anger. The drug's stimulation can produce a lack of sleep. Alcohol use causes uncoordination and social disinhibition, at higher levels possibly leading to aggressiveness, together with further imbalance and slurred speech. If the two drugs are combined, their effects cumulate. Both substances affect judgment, increasingly with the amount consumed.

According to Dr. Mohaupt, in his initial interviews appellant had denied drug use on the night of May 31-June 1, 1999, but he had admitted it in his second interview. Moreover he had described his alcohol consumption differently each time. Appellant first said he had consumed the second bottle of cognac between 2:00 and 6:00 a.m., but more recently, as at trial, he recounted drinking it all in front of McCoy's house. Based on the current interviews, Dr. Mohaupt would characterize appellant's intoxication at the time McCoy was shot as severe. However, had appellant finished the cognac four hours earlier, half of it would have metabolized before the shooting. Appellant had told the doctor his cocaine use had occurred before he drove Bell home, and it had made him feel friendly and awake. Dr. Mohaupt agreed that evidence that appellant's speech was not slurred, and that he was able to navigate stairs without loss of balance, would indicate the intoxication to have been less than severe.

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[6] Detective Winter had testified that the objective symptoms of the drug usually dissipate within 45 minutes to an hour and a half.

Testifying in rebuttal, Tony Kemenczey, manager of Bob's, recalled interviewing appellant at 5:00 pm. on June 1, 1999. Appellant did not appear to be under the influence. He returned to the club at about 1:00 a.m. and picked up Bell. Kemenczey closed and locked the club at 2:15 a.m. He testified that drinking was not allowed and generally did not occur there.

DISCUSSION

1. Evidence of Prior Domestic Violence.

Appellant first contends that it was prejudicial error to admit evidence of the two prior incidents of domestic violence against McCoy, in 1994 and 1998. The evidence was admitted under Evidence Code section 1109, subdivision (a)(1), which permits evidence of other domestic violence in a prosecution involving such violence, "if the evidence is not inadmissible pursuant to Section 352." Appellant contends that the prior incidents did not warrant admission under Evidence Code section 352, because they were cumulative on the issue of intent and were unduly prejudicial. We disagree.

In overruling appellant's objections to this evidence, the trial court stated that the prior incidents between appellant and McCoy would be relevant to issues of intent, deliberation, and premeditation, all of which defense counsel indicated would be contested. Appellant does not dispute this, but urges that the prior violence was cumulative on this score with his various verbal threats to harm McCoy. But the prior incidents were distinctly probative, in at least two respects. First, they showed that appellant had a dynamic capacity for violence against McCoy, not simply a tendency to talk, which could be disregarded. Second, both incidents of violence, like the ultimate murder, involved outbursts driven by appellant's desire to control the children. Indeed, just as the murder, the second incident ended with appellant's taking the children from McCoy's home.

On the other hand, proof of the prior incidents did not carry an overwhelming prospect of prejudice. The episodes by definition involved violence, but neither of them resembled the brutality of the ultimate offense committed. (Cf. *People v. Brown* (2000)

77 Cal.App.4th 1324, 1338.) And the very absence of visible injuries in the second incident, which appellant stresses, rendered it even less arguably prejudicial.

A trial court's determination under Evidence Code section 352 "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) That did not occur here. Moreover, the admission of the prior incidents in accordance with Evidence Code section 1109 did not deprive appellant of due process. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096.)

2. CALJIC No. 2.50.02.

With respect to the evidence received under Evidence Code section 1109, the jury was instructed with former CALJIC No. 2.50.02 (2000 rev.), to the effect that (1) if the jury found that appellant committed a prior offense involving domestic violence, it was entitled (but not required) to infer that he had a disposition to commit another such offense, and (2) if the jury found that appellant had that disposition, it was entitled (but not required) to infer that he "was likely to commit and did commit the crime or crimes of which he is accused." The instruction further stated, "However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. The weight and significance, if any, are for you to decide." Appellant argues that the net effect of this instruction was to permit the jury to find he committed the charged offenses if it found *beyond a reasonable doubt* that he committed the prior offenses. That effect, appellant contends, violated his due process right to have every element of the charged offenses proven beyond a reasonable doubt.

As appellant acknowledges, during the briefing of this appeal the Supreme Court rejected the same contention – as well as other assertions of inadequacy – with respect to former CALJIC No. 2.50.01 (1999 rev.), an instruction regarding evidence of prior sexual offenses (see Evid. Code, § 1108), which contained the same language as appellant here

challenges with respect to CALJIC No. 2.50.02. (*People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*).) As the court explained: "We likewise reject defendant's contention that the instruction 'implies by way of a negative pregnant that prior sex offenses proved beyond a reasonable doubt are indeed sufficient to prove the present offense beyond a reasonable doubt.' As we explained above, no juror could reasonably interpret the instructions to authorize conviction of the charged offense based solely on proof of an uncharged sexual offense. It is not possible, for example, to find each element of the charged crimes, as the jury was instructed to do before returning a guilty verdict, based solely on the [prior] offense. Nor is it possible to find a union or joint operation of act or conduct and the requisite intent for each charged crime, as the jury was also instructed to do. Hence, no reasonable jury could have been misled in this regard." (*Id.* at p. 1015; but see *id.* at p. 1017 [conc. & dis. opn. of Kennard, J., deeming the instructional language "potentially misleading"].)

In his reply brief, appellant "respectfully disagrees with the holding of the *Reliford* majority," and instead endorses Justice Kennard's minority position. Appellant is free to do so, but we cannot (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455), and do not. Appellant also seeks to distinguish *Reliford* on the grounds that in the present case the instructions included CALJIC No. 2.01, concerning sufficiency of circumstantial evidence, which appellant alleges reinforced the implicit misdirection of CALJIC No. 2.50.02, by stating that each fact necessary to an inference necessary to establish guilt must be proven beyond a reasonable doubt. But the distinction is untenable. It is extremely likely that CALJIC 2.01 also was given in *Reliford*, as was CALJIC No. 2.02 (*Reliford, supra,* 29 Cal.4th at p. 1016). And most fundamentally, a verdict of guilty, particularly in this special circumstance murder case, required proof and determination beyond a reasonable doubt of numerous elements that a finding that appellant committed prior offenses simply could not suffice to establish. (See *id.* at pp. 1013-1014.)

We conclude, as has the Supreme Court with respect to an identical instruction, that the giving of former CALJIC No. 2.50.02 did not violate appellant's due process rights.

3. Preclusion of a Defense Witness's Testimony.

Appellant's next contentions concern the preclusion of a defense witness's testimony, after the witness invoked his privilege against self-incrimination, and the court struck the limited testimony he had given. Appellant contends he was thereby denied his constitutional rights to compulsory process, to present witnesses in defense, and to due process (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15), and that these infringements derived from misconduct by the prosecutor, in effectively pressuring the witness to claim the privilege, and the trial court's erroneous refusal to allow the witness to testify subject to a limit on cross-examination in aid of the privilege. Before assessing these contentions, we review the record underlying them.

The witness in question was Alton Cullors, appellant's cousin, who appellant testified had drunk cognac and used cocaine with him at the Paradise bar the night before the shooting. Cullors initially testified that he and appellant had been together at the bar until about 1:30 a.m. After recounting that they both had used cocaine that night, Cullors answered the following question about its source: "Q And if you know[,] where did [appellant] obtain the cocaine that he used? [¶] A From me. And then too he probably had his own."

At this point the prosecutor interrupted, and stated at the bench that Cullors had just admitted a violation of Health and Safety Code section 11352, which prohibits furnishing or giving away cocaine. Suggesting that the court might consider appointing counsel for Cullors, the prosecutor stated he hadn't brought up the matter before because the discovery he had received had not reflected that Cullors had supplied the cocaine. In response, defense counsel noted that the alleged violation was nearly three years old, that Cullors's admission created no corpus delicti, and that counsel did not believe the prosecutor intended to prosecute Cullors "for something that occurred June the 1st of 1999 based only upon his own admissions and no other evidence whatsoever." The

prosecutor observed that the statute of limitations had not expired. After defense counsel acknowledged he had not previously advised Cullors about self-incrimination, the court excused the jury.

The court informed Cullors that his admission of furnishing cocaine "technically" incriminated him, although it would not alone suffice to convict him. The court offered to provide an attorney to advise Cullors about his situation. When the prosecutor objected to appellant's counsel speaking to Cullors, defense counsel rejoined, "He is obviously trying to keep a witness off the stand." Stating he wanted to do the right thing but not to face jail, Cullors requested an attorney be appointed. The court invited him to wait outside the courtroom, stating that neither the court nor the prosecutor was trying to pressure him, but that a corpus delicti could exist if other witnesses had seen the activity. The prosecutor then interjected, "There has been some corroborating evidence already that's from Ms. [Cathy] Bishop that he was under the influence. As you said [*sic*], in theory I can have him arrested right outside this courtroom. I have done that before so -- [¶] THE COURT: Okay. All right. [¶] But I am very interested that [appellant] get his version of the facts before the jury. . . . "[7] The court added that even if Cullors were counseled not to testify, "I think we would all be well advised to try to find a way to get his evidence in front of the jury by stipulation or whatever. . . . "

Appellant's counsel then offered to withdraw his last question to Cullors, and to proceed with his testimony that he and appellant had used cocaine, which had been outlined in discovery. The court inquired of the prosecutor about so proceeding, but the prosecutor responded negatively. When the court stated it was willing to strike the question and answer, the prosecutor stated, "I may want to get into it in my cross," and, "I don't think I should have my hands tied behind my back." Appellant's counsel protested that the prosecutor was committing misconduct, by waiting until trial to raise

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[7] The record does not clearly reflect whether Cullors had left the courtroom before this exchange.

the allegedly incriminating nature of testimony that had been provided in discovery months before, and moved for a mistrial.

The prosecutor responded that Cullors's discovery statement had not shown he would testify to violating Health and Safety Code section 11352, but only perhaps to a misdemeanor violation of section 11550 of that code (being under the influence), as to which the statute of limitations had expired. But, the prosecutor stated, he believed that Cullors intended to testify falsely about appellant's cocaine use, and the prosecutor would not hesitate to proceed against Cullors, either for perjury or under Health and Safety Code section 11352, if he could prove it.

The court denied the motion for mistrial, and requested that appellant's counsel proceed with his final witness – appellant – until Cullors could consult an attorney. After the jury was excused later that day, the clerk informed the court that an attorney had not yet been obtained, and an adjournment was taken.

Cullors appeared the next morning with counsel, who suggested that the statement about Cullors furnishing cocaine be stricken, with the privilege against self-incrimination to be exercised regarding that fact. In the discussion that followed, the court opined it would be unfair to the prosecutor to preclude him from asking questions about the source of the drug and the quantity furnished, subjects the court viewed as integral to Cullors's claim that appellant had used the substance, and to whether it actually was cocaine. Appellant's counsel added that Cullors could also testify about appellant's condition while in the bar. Counsel stated that at issue was limiting the prosecutor's cross-examination versus allowing appellant to present favorable evidence, and the court could resolve that conflict by foreclosing a very limited aspect of the cross-examination, while preserving it for the rest of Cullors's testimony. The prosecutor stated, however, that he had many questions to ask about the origin of the cocaine and how much Cullors furnished appellant. Moreover, although he would probably not be the one to decide if Cullors were to be prosecuted, the prosecutor would not offer him immunity.

The court concluded that it could not require the prosecutor to refrain from cross-examining regarding matter directly relevant to the point of Cullors's testimony.

Therefore, the court stated, "it's an all or nothing thing here. [¶] Either he testifies and waives his privilege, or he doesn't testify." Again expressing a desire that appellant be able to proceed, the court asked Cullors's counsel whether Cullors wished to claim the privilege, in which case his testimony would be stricken. Cullors said he did. Cullors's counsel suggested striking only the offending portion of the testimony, but the court replied, "There are situations where you can strike part of the testimony, but here this goes to the heart of which he's being called as a witness. [¶] . . . [¶] THE COURT: And so to strike the portion that you request would be effectively denying the prosecutor any right to examine this witness."

The court concluded it would sustain Cullors's claim of privilege regarding any question concerning his furnishing cocaine to appellant, and "Because that's the germaine [*sic*] part of his testimony, I'll strike his testimony."[8] Appellant objected, the prosecutor moved to strike the testimony, and the court did so. The court adhered to its position when appellant's counsel suggested that Cullors be allowed to testify solely to his observations of appellant's demeanor inside the bar, after using others' cocaine.

Appellant contends that he was denied the opportunity to present Cullors's testimony, through both prosecutorial misconduct and judicial error. Considering first the claim of prosecutorial misconduct, we disagree with it.

Prosecutorial misconduct in the context of deprivation of a witness's testimony involves "'conduct that was "entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify."'" (*People v. Lucas* (1995) 12 Cal.4th 415, 457.) That characterization does not apply to the prosecutor's suggesting that the court might consider appointing counsel for Cullors, after he unexpectedly testified to furnishing

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[8] Asked if this is what he wanted, Cullors told the court, "I would like to testify. but I don't want to be . . . incriminated for something, you know, or go through something just because, you know, Mr. D.A wants leverage."~(RT 2417:13)~

cocaine, which could be incriminating under Health and Safety Code section 11352. In so doing, the prosecutor was enabling performance of the court's duty to ensure Cullors advisement of his self-incrimination privilege. (*People v. Warren* (1984) 161 Cal.App.3d 961, 972; cf. *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1247.)

Appellant contends, however, that the prosecutor subsequently made inappropriate statements that intimidated Cullors, namely that (1) he could be arrested outside the courtroom, (2) he could receive up to five years for furnishing because he had a prior conviction, (3) the prosecutor would pursue Cullors for perjury or furnishing if those charges could be proved, (4) the three-year statute of limitations for cocaine possession had not run, and (5) if there were a prosecution Cullors's testimony would be used against him. Appellant exaggerates the context and significance of all of these statements. As previously noted, it is by no means clear that Cullors was present to hear the first statement. He was definitely absent during the second and third ones, both of which the prosecutor made for the court's information. The fourth remark, about the statute of limitations also apparently outside Cullors's presence – was made to correct his attorney's observation that the statute had expired. But the prosecutor never suggested a prosecution for narcotics possession, as distinguished from furnishing. Finally, the observation that Cullors's present testimony would be used against him if he were prosecuted was a statement of the obvious.

The prosecutor's statements thus were not, as in the cases cited by appellant (see *In re Martin* (1987) 44 Cal.3d 1, 30), threats delivered to Cullors. They were clarifying explanations to the court, and in any event Cullors did not hear most of them.[9] The prosecutor's conduct did not exceed the scope of his duties, and hence appellant's loss of Cullors's testimony was not the product of prosecutorial misconduct. Moreover, the

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[9] Appellant notes that Cullors's attorney was provided a daily transcript of the preceding day's session. That does not establish that counsel communicated to Cullors any of the prosecutor's statements made in his absence.

actual cause of Cullors's declining to testify was the trial court's refusal to permit him to claim the privilege against self-incrimination as to one distinct subject. It is here that error appears.

Both appellant's counsel and later Cullors's attorney suggested that the conflict between Cullors's testifying for appellant and preserving his own right against self-incrimination could be resolved by striking Cullors's untimely answer and allowing him to continue his testimony while invoking the privilege with respect to having furnished appellant cocaine. Initially receptive to this proposal, the court ultimately became convinced that it would impose too great a restraint on the prosecutor's cross-examination of Cullors, to the point of "effectively denying the prosecution any right to examine" him. The court accordingly ruled that Cullors could not testify with the subject of his furnishing cocaine excluded from direct and cross-examination. Rather, his entire testimony was stricken and foreclosed. In so ruling, the court erred.

Complete striking of testimony and preclusion from further testifying are not automatic consequences of a witness's refusal to testify in certain regards, because of privilege or other reason. In a leading decision that upheld the striking of a criminal defendant's testimony after he refused to identify his confederates, the court nonetheless observed that "striking a defendant's entire testimony is a drastic solution," and that other measures, such as partial excision of testimony, should first be considered. (*People v. Reynolds* (1984) 152 Cal.App.3d 42, 47-48 (*Reynolds*).) The court noted the opinion of Wigmore, that while a complete refusal to undergo cross-examination justifies striking the direct testimony, "'the refusal or evasion of answers to one or more questions only need not lead to this result . . . . [¶] . . . .'" (*Id.* at p. 47, quoting 5 Wigmore, Evidence (3d ed. 1940) The Hearsay Rule Satisfied: By Cross-Examination, § 1391, p. 112, fns. omitted.)

An instructive example appears in *People v. Robinson* (1961) 196 Cal.App.2d 384. There a burglary defendant's accomplice testified for the prosecution at the preliminary hearing. On cross-examination, he recounted selling the loot to various persons, but refused to identify them. The magistrate struck only the testimony about disposal of the

goods, and held the defendant to answer. The superior court then granted a motion under section 995, on grounds "that the refusal of the witness . . . to answer questions relative to the disposition of the stolen goods cut off a material inquiry on cross-examination and required the striking of all of his testimony." (*Robinson,* at p. 387.) Reversing, the Court of Appeal quoted Wigmore, as *Reynolds, supra,* 152 Cal.App.3d 42 did, and distinguished other cases approving the striking of an unwilling witness's entire testimony, as follows: "[I]n each of the above cases the subject matter of the cross-examination of which the defendant was deprived went to the heart of the controversy. . . . [¶] In the instant case, on the other hand, the witness refused to answer but one question which, though relevant to the credibility of the witness, had no bearing on the actual elements of the crime of burglary with which the defendant was charged." (*Robinson, supra,* at p. 389.)

In the present case, the subject to which Cullors interposed his privilege against self-incrimination was only peripherally relevant to the subject matter on which appellant called him to testify: his observations of appellant and appellant's alcohol and cocaine use at the Paradise. Without reference to or inquiry about Cullors's having provided at least part of the cocaine, the prosecutor still could have cross-examined him thoroughly, not only about his observations but also about whether he was telling the truth, including with respect to the presence and potency of the cocaine. Cullors could have admitted that he had used the same supply as appellant, and he could have been cross-examined about its appearance, sensations, and effects, without having to disclose that he had furnished it. We see no basis for the court's assumption that striking Cullors's testimony about furnishing "would be effectively denying the prosecution any right to examine" him. Rather, the prospective restriction of cross-examination was so slight, particularly as contrasted with the legal and practical interference with appellant's defense case that was worked by barring Cullors's testimony, that it was an abuse of discretion to do so, rather than permit the witness to testify while invoking his privilege as proposed.

Although the ruling that precluded Cullors from testifying was erroneous, the error does not require reversal of the judgment, whether assessed under the test of *People v.*

Watson (1956) 46 Cal.2d 818, or that of *Chapman v. California* (1967) 386 U.S. 18. Cullors's proposed testimony about appellant's substance use and intoxication at the Paradise was offered to help establish, circumstantially, that appellant lacked specific intent to kill when he fired the shots at McCoy. But several factors greatly diminished the probative and persuasive contribution of such testimony to appellant's defense. The period over which Cullors and appellant were together ended at approximately 1:30 a.m. on June 1, 1999, while the shooting occurred after 7:00 a.m., about five and a half hours later. There was uncontradicted evidence, however, that the effects of any cocaine appellant ingested in Cullors's presence would have dissipated long before. Furthermore, numerous witnesses to appellant's demeanor, both at the Paradise and then contemporaneous with the shootings, recounted behavior inconsistent with intoxication. On the other hand, appellant was able to present a complete account of his drug consumption and its alleged effects, at all times and places on the night and morning before the shooting, through his own testimony. The jury was thereby fully informed about the basis for the claim regarding intent. In this regard, Cullors's testimony would have been cumulative. Considering as well the totality of the evidence bearing on appellant's intent, we conclude that the preclusion of Cullors's testimony was harmless error.

4. The Firearm Enhancement Under Section 12022.53.

As summarized at the outset, appellant received a sentence of life without possibility of parole, for committing the murder with the special circumstance of lying in wait (§ 190.2, subd. (a)(15)), and also an enhancement of 25 years to life, for discharging a firearm and causing death, pursuant to section 12022.53, subd. (d). Appellant contends that imposition of the enhancement was barred by subdivision (j) of section 12022.53, which relevantly provides, "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, *unless another provision of law provides for a greater penalty or a longer term of imprisonment.*" (Italics added.)

In appellant's view, the italicized language signifies that an enhancement provided by section 12022.53 should not be imposed if the punishment for the offense itself is greater than the enhancement term would be. We do not agree. The incongruity of this suggested interpretation of section 12022.53 was recently explored at length by *People v. Vo* (Aug. 14, 2003, C034960) __ Cal.App.4th __ [2003 D.A.R. 10279]). The language on which appellant relies more naturally refers to another firearm enhancement provision, or at least to another law that punishes conduct that would engender the section 12022.53 enhancement. Appellant's life without parole sentence, however, was not prescribed for or dependent on his using a firearm. The enhancement under section 12022.53 was properly imposed.[10]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J. BOLAND, J.

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[10] The case on which appellant bases his argument has since been depublished. (*People v. Navarro* (Mar. 17, 2003, B148711) review den. and opn. ordered nonpub. June 25, 2003, S115867.)